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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

DAN W. SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether a suspect's waiver of his Fifth Amendment right to counsel is rendered constitutionally invalid solely because the police did not inform him that counsel had been present at the jail and had sought to consult with him prior to interrogation.

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OPINIONS BELOW

The Supreme Court of Illinois issued its opinion in this case on September 17, 1982. A slight modification of that opinion was subsequently made on November 24, 1982 upon denial of a petition for rehearing. Following recall of its mandate after petitioner's motion expressing intent to file the instant Petition, the Court, *sua sponte*, again modified its opinion on January 7, 1983. The (twice modified) opinion is as yet unreported. The Court held that the respondent's incriminating statements, which were admitted at his trial for murder and armed robbery, were elicited during interrogation con-

ducted in violation of the respondent's Fifth Amendment right to counsel. The Court found that the respondent did not knowingly waive his Fifth Amendment right to counsel where the evidence did not show that, after refusing counsel access to the respondent, police informed respondent before interrogation almost twenty-four hours later that counsel had been present and sought to consult with him. The Court accordingly reversed the respondent's convictions and remanded the case for a new trial. A copy of the Illinois Supreme Court's opinion is included as Appendix A to this Petition.[1] The order of the Court denying rehearing is included as Appendix B. The order recalling the mandate and the notice attendant to the January 7, 1983 modification of the opinion are included as Appendix C.

The Illinois Appellate Court, Second District had previously issued an opinion affirming the respondent's convictions. *People v. Smith*, 91 Ill. App. 3d 438, 414 N.E.2d 1281 (2d Dist. 1980). That court found that the interference with counsel's access to the respondent constituted a violation of the respondent's Sixth Amendment right to counsel but that various intervening circumstances between the interference and interrogation of the respondent dissipated any taint of illegality in such interference. A copy of the Appellate Court's opinion is included as Appendix D to this Petition.

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[1] The January 7, 1983 modification was the addition of a paragraph at page 8 of the opinion, beginning with the "X" placed thereon by the court. See Appendix A at 8a.

JURISDICTION

The opinion of the Illinois Supreme Court reversing the judgments of the Appellate and Circuit Courts was rendered on September 17, 1982. The Illinois Supreme Court denied a timely petition for rehearing, but slightly modified its opinion, on November 24, 1982. This Petition is filed within sixty days of that order. Although since that order, the Illinois Supreme Court on January 7, 1983, again modified its opinion, petitioner does not seek to rely on such modification to extend the time for filing the instant Petition. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), since in the proceedings in the state courts of Illinois the respondent has asserted an alleged violation of his rights arising under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV provides, in pertinent part, that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Dan W. Smith, was convicted of murder and armed robbery after a jury trial in the Circuit Court of Ogle County, Illinois and subsequently was sentenced to life imprisonment for the murder and fifty years concurrent imprisonment for the armed robbery.

Respondent was arrested on September 1, 1978 and gave incriminating statements on September 3, 4 and 6, 1978. Prior to trial respondent filed a motion to suppress the statements alleging that they were elicited in violation of his rights under, *inter alia*, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Two of the statements, those made on September 3 and 4, were deemed admissible by the Circuit Court after a suppression hearing involving the following evidence and findings.

The respondent and Mary Smith[2] were arrested in Winnebago County, Illinois, pursuant to Ogle County arrest warrants, shortly before midnight on September 1, 1978 and were taken to the Winnebago County Sheriff's Office. Soon after midnight, now September 2, Ogle County police advised respondent of his *Miranda* rights and attempted to question him but ceased such attempt after ten minutes due to respondent's drowsy, incoherent condition.

Later the same morning, respondent and Mary Smith met with Attorney Joseph Spiezer. According to the tes-

[2] The case against Mary Smith was severed from that against respondent. Mary testified for the State at respondent's trial and in return for her testimony the prosecution agreed to drop the murder charge against her and allow her to plead guilty to armed robbery.

timony of Mary, Spiezer agreed to represent the pair, although the trial court found "no evidence as to what arrangements, if any, were made as a result of that conversation." Still later that morning respondent and Ms. Smith appeared in the Circuit Court of Winnebago County. The presiding judge from that hearing later testified that at such time respondent appeared normal, gave responsive answers and was advised of his rights including the right to the presence of counsel at questioning. The trial court found that Attorney Spiezer had not been present at the Winnebago County hearing. After the Winnebago hearing respondent and Ms. Smith were transported to the Ogle County jail.

The events of 3:00 P.M. on September 2, 1978 were in dispute at the suppression hearing. Carol Ellerby, a partner of Attorney Spiezer, testified that on Spiezer's instructions she went to the Ogle County jail to visit both the respondent and Mary Smith. While Ellerby was able to see Ms. Smith, the jailer, whom she thought was John Willard, told her that she could not see the respondent because he was going through heroin withdrawal and was shaking so hard that he could not stay on the bed. Ellerby testified that she wrote on one of her business cards that she was Mr. Spiezer's partner and that respondent should make no statements unless one of his attorneys was present. Ellerby further stated that she gave the card to Willard to give to respondent and that Willard read the card and agreed to transmit it to respondent.

Respondent testified that he received Ellerby's card from Willard on September 2, the same day. Respondent also testified that he continuously asked Willard for, but was refused, permission to call his attorney, and that he began going through heroin withdrawal on that same day.

John Willard testified that he was on duty as a jailer at 3:00 P.M. on September 2 and that he did not remember Attorney Ellerby asking to see respondent. Willard denied telling Ellerby that respondent was going through heroin withdrawal; denied that the respondent appeared to be going through heroin withdrawal (as did other witnesses) with regard to both September 2 and 3; and stated that he never refused an attorney access to a client.

The trial court's findings on these points were that Attorney Spiezer's law firm represented respondent at 3:00 P.M. on September 2; that Attorney Ellerby's version of the conversation with John Willard was correct but that Willard did not know the content of the message Ellerby wrote on her business card; that respondent never requested counsel (either of Willard or of anyone else on the days following on which he made incriminating statements); and that respondent was not suffering the effects of heroin withdrawal either on Saturday, September 2, 1978 or during his statements to police on the days following September 2.

At approximately 3:30 P.M. the same day, Attorney Ellerby returned to the jail, again on Mr. Spiezer's instructions, this time only to see Mary Smith because of rumors that Mary had given the police a statement. Ellerby testified that she was told that she could not see Mary because Mary had retained another attorney. Ellerby explained that the sheriff told her that he would have Mary write down that she had retained other counsel but that she (Ellerby) indicated to the sheriff that she wanted to hear such information personally from Mary. Ellerby and Robert Thorsen, another partner in the law firm, then went to the home of Judge John Moore to seek permission to see Mary Smith personally

to determine whether Mary had retained other counsel. Ellerby testified that at Judge Moore's home the subject of the firm's representation of respondent was not mentioned.

Judge Moore, however, testified that Mr. Thorsen had "said that Mr. Spiezer did not represent [respondent] because [respondent] did not have any money." In its findings the trial court found Judge Moore's version of the conversation to have been correct.

Thereafter, at about 4:30 P.M., Ellerby and Thorsen returned to the jail where, in the presence of jail personnel including Sheriff Brooks and Detective Messer, they told Mary that their firm did not represent respondent and ascertained from Mary that, in fact, she had retained other counsel. The trial court found that Mr. Spiezer's law firm was not representing the respondent from at least that point in time until after respondent's incriminating statements on September 3 and 4 and that jail personnel were aware of that fact.

On the following day, September 3, police for the first time since the very early morning hours of September 2 sought to question respondent. At 2:15 P.M., Detective Messer began advising respondent of his *Miranda* rights. Although respondent twice interrupted, insisting that he knew his rights, Messer completed his admonitions. Respondent acknowledged understanding of his rights, agreed to make a statement and suggested taping the statement. At respondent's request he was allowed a ten minute conference with Mary Smith, after which he was again advised (on the tape recording) of his *Miranda* rights and he again acknowledged understanding of those rights. Respondent then gave a statement. In its findings the trial court indicated that in response to a single question respondent, without further questioning, proceeded to narrate a long, complete his-

tory of the offense. The trial court also found, from evidence that respondent had asked Detective Messer to get Mary out on bond (which request Messer refused), that respondent's motivation in making the admissions may have been to help Mary.

On the following day, September 4, 1978, at 10:00 A.M., Sheriff Brooks met with the respondent. Brooks advised respondent of his *Miranda* rights even though respondent stated that he understood his rights. At respondent's request Mary Smith was brought into the room. Brooks then again advised respondent of his *Miranda* rights and respondent, once again, acknowledged understanding of those rights. Respondent and Mary Smith read over each page of a statement typed from respondent's taped statement to Detective Messer on September 3. Respondent made some corrections and additions and signed each page and Mary Smith and Sheriff Brooks signed as witnesses. After going over the statement respondent asked Brooks for another statement form and added another page in his own handwriting. The trial court found that respondent's writing of such page was not prompted by any interrogation by Brooks.

On September 5, 1978, an amended Information charging both respondent and Mary Smith with murder and armed robbery was filed in the Circuit Court of Ogle County. On that same day, Mr. Spiezer entered his appearance as counsel for the respondent. The next day, September 6, at his own request, respondent met with Ogle County State's Attorney Peter Woods.[3] Woods advised respondent of his *Miranda* rights and specifically

[3] Due to the anticipated testimony of State's Attorney Woods at the hearing on respondent's motion to suppress, special prosecutors earlier had been appointed to prosecute this case.

asked respondent if he was willing to speak without Mr. Spiezer present. Respondent agreed that he was willing to speak. Respondent then gave a statement concerning the murder. On cross-examination, Woods indicated that he had told respondent that he would seek the death penalty for respondent but admitted that he told respondent that he thought Judge Moore was a lenient judge and discussed another case, indicating that respondent could use the sentences received by the defendants in that case as a gauge.

At the argument on respondent's motion to suppress, Mr. Spiezer urged, in relevant part, that respondent's incriminating statements were the fruit of Jailer Willard's wrongful intrusion into the attorney-client relationship. Under questioning by the court, Mr. Spiezer claimed that the passage of time could not cure such interference, that the taint from the denial of access to respondent would carry on forever, and that it was irrelevant to the admissibility of respondent's statements that the Spiezer law firm may have unilaterally terminated its representation of respondent subsequent to the intrusion by Jailer Willard but before the questioning of respondent began.

The trial court denied respondent's motion to suppress his statements of September 3 and 4. The court found that respondent "did knowingly waive and intelligently and voluntarily waive his *Miranda* rights," with regard to both statements and that the statements were otherwise voluntary, as well. The court also found that such statements were not taken in violation of respondent's Sixth Amendment right to counsel, finding that respondent waived that right "almost on his own initiative."

The trial court suppressed respondent's September 6 statement to State's Attorney Woods on the sole ground

that respondent may have interpreted Woods' comments regarding respondent's use of another case as a gauge as an implied promise of leniency. The court found no *Miranda* problem with such statement and specifically indicated as follows with regard to respondent's right to counsel:

> And as far as counsel is concerned, the Defendant was asked if Mr. Spiezer did not represent him and do you want him here. And the defendant indicated, "No." Now I bring that up to show at least here it is very clear there was a waiver of right to counsel present. And it indicates also, even though it is after the event, it indicates that the Defendant was not apparently willing or did not desire to rely on counsel at any point in this proceeding, up to and including the statement to Woods.

The case proceeded to jury trial at which time respondent's September 3 and 4 statements were admitted. Respondent was found guilty of both murder and armed robbery and subsequently was sentenced to life imprisonment for the former and fifty years concurrent imprisonment for the latter.

Respondent appealed his convictions to the Illinois Appellate Court, Second District. There he claimed that Jailer Willard's September 2, 1978 unexplained action of denying Attorney Ellerby access to him constituted a violation of his Sixth Amendment right to counsel and that his custodial statements of September 3 and 4, 1978 should have been suppressed as the direct fruits of such violation. The Appellate Court affirmed respondent's convictions holding that although Willard's action constituted a wrongful interference with the attorney-client relationship, respondent's subsequent statements could not be deemed the illegal fruits of Willard's misconduct in light of various intervening circumstances between the misconduct and the initial questioning of the re-

spondent by police. Among such circumstances were: respondent's receipt of Attorney Ellerby's business card from Willard on the same day as the interference; the passage of almost 24 hours from the interference to the time when respondent was first questioned and that before questioning began, respondent was given *Miranda* warnings; respondent acknowledged understanding of his rights; consented to give a statement; was then allowed a conference with Mary Smith; was given renewed *Miranda* warnings; again acknowledged understanding of his rights; and, finally, again agreed to make a statement. *People v. Smith*, 91 Ill.App.3d 438, 414 N.E.2d 1281 (2nd Dist. 1980).

Respondent then sought, and was granted, leave to appeal to the Illinois Supreme Court. In that court respondent again challenged the admission at trial of his September 3 and 4, 1978 statements only on Sixth Amendment grounds claiming that the intervening circumstances relied upon by the Appellate Court were, as a matter of law, insufficient to attenuate the taint of Jailer Willard's interference with the attorney-client relationship. In its opinion reversing respondent's convictions, the Illinois Supreme Court expressly declined to address the case as one involving respondent's Sixth Amendment right to counsel, the manner in which the case had been briefed and argued. Rather, the court, *sua sponte*, treated the case as one involving respondent's right to counsel under the Fifth Amendment. In this regard the court adopted the following rule:

> [W]hen police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him.

Slip Op. at 9. (Appendix A at 9a)

The court found that no evidence—including respondent's receipt from the jailer of Ellerby's business card—showed that the respondent, before questioning, was informed that Attorney Ellerby had been present and sought to consult with him. Accordingly, the court deemed respondent's waiver of his Fifth Amendment right to counsel invalid and held that respondent's confessions were improperly admitted at trial. Petitioner's petition for rehearing was denied with a slight modification of the opinion on November 24, 1982. On January 7, 1983, the Illinois Supreme Court, *sua sponte*, further modified its opinion.

REASON FOR GRANTING THE WRIT

A SUSPECT'S WAIVER OF HIS FIFTH AMENDMENT RIGHT TO COUNSEL IS NOT RENDERED CONSTITUTIONALLY INVALID SOLELY BECAUSE THE POLICE DID NOT INFORM HIM THAT COUNSEL HAD BEEN PRESENT AT THE JAIL AND HAD SOUGHT TO CONSULT WITH HIM PRIOR TO INTERROGATION.

This Court should grant certiorari to determine whether warnings over and above those required by *Miranda v. Arizona*, 384 U.S. 436 (1966), are a constitutional prerequisite to a suspect's waiver of his Fifth Amendment right to counsel, as applied to State courts via the Fourteenth Amendment, whenever, prior to questioning, police have denied a retained or appointed attorney access to the suspect. The Illinois Supreme Court held that in this situation a suspect's knowing waiver of such right is constitutionally precluded unless the suspect has been informed that counsel was present and seeking to consult with him. Since no evidence

showed that respondent had been so informed[4] the court reversed his convictions for murder and armed robbery. Such *per se* rule is not mandated by *Miranda* and is tantamount to an improper holding that a third party may assert the privilege against self-incrimination for the actual holder of the privilege.

As noted by the Illinois Supreme Court (Appendix A at 6a-8a) several states have adopted prophylactic rules requiring more than *Miranda* warnings and waiver of those rights to render admissible a suspect's statement following police frustration of an attorney's attempt to see the suspect. *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980); *State v. Matthews*, 408 So.2d 1274 (La. 1982); *Commonwealth v. McKenna*, 355 Mass. 313, 244 N.E.2d 560 (1969); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jones*, 19 Wash.App. 850, 578 P.2d 71 (1978). The instant case provides a unique context in which to assess whether such rules are constitutionally mandated.

This case is readily distinguishable from all of the foregoing cases in which such rules have been adopted. In those cases, counsel were rebuffed either during interrogation or soon before interrogation, both of which

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[4] Application of the rule to respondent's case does not even appear sustainable. Respondent received from the jailer counsel's calling card after the interference but before interrogation and, virtually by definition, the card conveyed the same information required by the rule. Even accepting the court's finding to the contrary, respondent's receipt of the card from the jailer suggests that the jailer may have complied with the rule; that no evidence to such effect was adduced is readily understandable since the rule did not exist until the decision of the Illinois Supreme Court and little reason existed for questions to be asked on such point. In light of this background. the finding of the court below that "[T]he defendant was not informed that his attorney was available. . . ." (Appendix A at 9a) appears to be based on pure speculation.

situations suggest that the interference with counsel's access to the client was for the purpose of holding a defendant incommunicado until a statement could be obtained from him.

Here, however, respondent was not questioned until twenty-one hours after counsel was turned away and in the interim, counsel, for reasons unrelated to the interference, announced to police that the firm did not represent respondent. Additionally, respondent received from the jailer counsel's business card on which was written a warning not to speak to police in the absence of counsel. Respondent was even allowed to meet with his co-defendant prior to interrogation. Further, respondnet never asked for counsel or took actions which could be interpreted as manifesting an intent to act through counsel. *See, e.g., Commonwealth v. McKenna.*

Additionally, unlike *State v. Haynes*, upon which the Illinois Supreme Court placed primary reliance, *State v. Matthews*, and *Commonwealth v. Hilliard*, the decision below clearly purports to be an interpretation of the federal Constitution and presents a well-defined issue—whether the Fifth Amendment mandates such a prophylactic rule. That this is so is demonstrated by the paragraph at page 8 of the opinion, added by the Illinois Supreme Court during the sixty day period for filing of the instant petition. See Appendix A at 8a. The court expressly declined to review the case as one arising under the Sixth Amendment, though both parties had briefed and argued the case only in that manner and though both the trial and appellate courts had so decided the issue. The Fifth Amendment does not mandate such a rule.

In *Miranda*, this Court held that as a prerequisite to custodial interrogation a suspect must be warned, *inter alia*, of his right to consult with counsel and to have

counsel with him during questioning. This Court found that since the right to counsel exists at questioning and since a suspect cannot waive his Fifth Amendment privilege without a knowing waiver of such right the warning would give "ascertainable assurance that the accused was aware of this right." 384 U.S. at 472.

If such warning was sufficient to provide "ascertainable assurance" that a suspect was aware of his right to counsel in *Miranda* there simply is no reason that the warning is insufficient to provide the same assurance where counsel has been frustrated in an attempt to see the suspect. Surely this Court must have contemplated this situation when it decided *Miranda*. In *Miranda*, this Court specifically reaffirmed *Escobedo v. Illinois*, 378 U.S. 478 (1964) which, itself, involved the frustration of an attorney's attempt to see his incarcerated client. Against that background *Miranda* should be deemed sufficient, at least in terms of the warnings necessary to make a suspect aware of his rights, to meet all situations.

The Illinois Supreme Court's recent modification of its opinion (Appendix A at 8a) suggesting that support for a contrary position is found by reading *Escobedo*, together with footnote 35 of *Miranda* and subsequent case-law interpreting *Escobedo*, is simply untenable. In footnote 35 of *Miranda* (384 U.S. at 465-66, n. 35), this Court, in discussing *Escobedo*, noted that the action of police in preventing the attorney from consulting with his client constituted a violation of the Sixth Amendment right to assistance of counsel and excluded any statement obtained in its wake.[5]

[5] Whether respondent's statements were elicited in the wake of, or, stated alternatively, as the fruits of police interference with counsel's access to respondent was precisely the issue argued to the court below, which issue that court refused to decide.

While it is true that this Court subsequently has found that the "prime purpose" of *Escobedo* was to vindicate that defendant's Fifth Amendment rights (*Kirby v. Illinois*, 406 U.S. 682, 689 (1972)), that does not mean that the aspect of *Escobedo* referred to in footnote 35 of *Miranda* was addressed to Fifth, as opposed to Sixth, Amendment concerns. The Fifth Amendment concerns of *Escobedo* clearly were only those brought about by Escobedo's desire to not incriminate himself, as manifested by his request for counsel, not those of counsel trying to see Escobedo. The Illinois Supreme Court, in essence, has held that the latter situation, a Sixth Amendment violation, necessarily results in the former, a Fifth Amendment violation. As discussed subsequently in this Petition, however, such holding is tantamount to an improper holding that a third party may assert the privilege against self-incrimination for the actual holder of the privilege.

It is acknowledged that since the decision in *Miranda* there have been cases in which this Court has held that more than mere *Miranda* warnings may be necessary in given situations. *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *Edwards v. Arizona*, 451 U.S. 477 (1981). But in none of those cases was the issue limited to whether a suspect was aware of his Fifth Amendment right to counsel, as in this case.

The apparent rationale for the *per se* rule adopted below is that by telling a suspect that his attorney had been present and sought to consult with him it will inspire the suspect's confidence in his dealings with police and thereby protect his privilege not to incriminate himself. Such a theory, however, presupposes that a suspect would respond to such information and that he would express some interest in seeing counsel. Even assuming that the suspect would do so, and further

assuming that the suspect thereafter would meet with counsel and then be informed that he should not talk to police, it cannot necessarily be said that such process would have made it more unlikely that the suspect would respond to police interrogation than would have been the case had the suspect received *Miranda* warnings alone.

The instant case, perhaps better than any hypothetical, well demonstrates this point. Respondent had met with Attorney Spiezer on the morning following his arrest and thus, at a minimum, apparently knew that he had counsel. Even if it is assumed that Spiezer did not tell respondent of his right to have Spiezer present at questioning respondent must have deduced that he had such a right when several hours later, at his initial arraignment, he was admonished by the presiding judge that he was entitled to have counsel present at questioning. Nevertheless, despite respondent's testimony to the contrary, the trial court found that respondent never thereafter during the period in question sought Mr. Spiezer's services.

Two other trial court findings regarding respondent's initial admissions to police are noteworthy in this regard. The court found that the testimony suggested that respondent's initial statements may have been motivated by his hope of having his co-defendant released on bond. The court also found, based on respondent's outbursts and "sort've fencing operation with the prosecutor" at the suppression hearing, that respondent was strong-willed, aggressive and "not to be pushed around easily or lulled into doing things . . . on an easy basis." Against this background, it appears that warnings above and beyond those required by *Miranda*, as held constitutionally mandated by the Illinois Supreme Court, would have accomplished nothing in terms of protecting respondent's Fifth Amendment privilege.

That the added warnings would not necessarily have protected respondent's Fifth Amendment privilege is perhaps best demonstrated by consideration of the circumstances of respondent's September 6th confession to the State's Attorney, which confession was suppressed on an unrelated basis. On September 5th, an amended Information had been filed and respondent appeared in court represented again by Mr. Spiezer. Yet the following morning respondent, himself, initiated a meeting with the State's Attorney at which meeting respondent made further incriminating statements. At the beginning of the meeting, the State's Attorney specifically asked respondent whether he wished to speak in the absence of Mr. Spiezer and respondent indicated that he did. While admittedly after the fact of respondent's first two statements to police, such actions by respondent were indicative of respondent's entire course of dealings with authorities and demonstrated a continuing intent to act without counsel.

However, even assuming that a prophylactic rule such as that adopted below might protect a theoretical suspect's Fifth Amendment privilege such fact does not mean that the rule is constitutionally mandated. A bar on the admissibility of confessions elicited during custodial interrogation certainly would protect a suspect's Fifth Amendment privilege yet in *Miranda* this Court did not adopt such a rule. A requirement that a suspect's waiver of his Fifth Amendment right to counsel be expressly made no doubt would have protected further the defendant's privilege against self-incrimination in *North Carolina v. Butler*, 441 U.S. 369 (1979). Nevertheless, this Court rejected such a *per se* rule, finding that:

> [E]ven when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on "the particular facts and

> circumstances surrrounding that case, including the background, experience and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461.

441 U.S. at 374-375.

Since the instant case presents essentially the identical issue as that presented in *North Carolina v. Butler*, —whether a suspect knowingly waived his Fifth Amendment right to counsel—the Illinois Supreme Court's holding finding constitutionally mandated a standard more stringent than that deemed applicable in that case cannot rationally stand. *Oregon v. Hass*, 420 U.S. 714 (1975).

The problem with the rule adopted below is that it tends to misallocate the privilege actually at stake during custodial interrogation. Although the Fifth Amendment right to counsel recognized in *Miranda* is described as a "right to counsel" and often is discussed in a manner like the right to counsel arising under the Sixth Amendment, the two rights are not really the same. The Fifth Amendment right to counsel is a "limited right" accorded a suspect in order to protect his Fifth Amendment privilege against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454, 470, n. 14 (1981). When, before or during custodial interrogation, a suspect has requested counsel or failed to manifest an intent to waive counsel what he really has done is invoked his Fifth Amendment privilege against self-incrimination.

Rules, such as that adopted below, which bar otherwise valid waivers of the Fifth Amendment right to counsel as a result of the fortuitous circumstance that counsel attempted to visit the suspect essentially allow a third party, counsel, to invoke the suspect's Fifth Amendment privilege for the suspect. Nothing in *Miranda* suggests that such was the intent of this Court in

delineating the Fifth Amendment right to counsel and, indeed, this Court's reference to the "individual's right to choose between silence and speech" (384 U.S. at 469) militates against such a conclusion.

In the recent case of *State v. Burbine*, 451 A.2d 22 (R.I. 1982), the Rhode Island Supreme Court rejected a defendant's proposal that it adopt such a prophylactic rule out of this very concern, finding that *Miranda* placed "the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys." 451 A.2d at 28. The court aptly noted that the adoption of a rule which allows a third party to assert a suspect's Fifth Amendment privilege for him could ultimately result in the inadmissibility, on Fifth Amendment grounds, of all statements "on the theory that a person could not be denied his right to counsel on the fortuitous circumstances that someone might not see fit to call the station" on the suspect's behalf. 451 A.2d at 30. Petitioner maintains that that opinion correctly reflects the law on a suspect's Fifth Amendment right to counsel although petitioner does not subscribe to that opinion to the extent that it may be based on the absence of an attorney-client relationship between the defendant therein and the attorney who called police on his behalf, a factor petitioner maintains is irrelevant under the Fifth Amendment.

It has been held that the government's burden of showing a defendant's waiver of his Sixth Amendment right to counsel is greater than its burden of showing a defendant's waiver of his Fifth Amendment right to counsel. *United States v. Satterfield*, 558 F.2d 655, 657 (2nd Cir. 1976); *United States v. Springer*, 460 F.2d 1344, 1352 (7th Cir. 1972); *People v. Anthony*, 38 Ill.App. 3d 427, 347 N.E.2d 770, 774 (5th Dist. 1976). In re-

sponse to respondent's arguments that his statements were elicited in violation of both *Massiah v. United States*, 377 U.S. 201 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977), two courts have already found that petitioner met that higher burden and had demonstrated that respondent validly waived his Sixth Amendment right to counsel. *People v. Smith*, 91 Ill.App.3d 438, 414 N.E.2d 1281 (2nd Dist. 1980). By not addressing that issue[6] but instead imposing a *per se* rule which allows counsel to invoke a defendant's Fifth Amendment rights for him, the Illinois Supreme Court has made the government's burden to demonstrate a valid waiver of the Fifth Amendment right to counsel higher than its burden to demonstrate a valid waiver of the Sixth Amendment right to counsel.

Certiorari should be granted to resolve such confusion concerning the Fifth and Sixth Amendment rights to counsel, to clarify that *Miranda* accorded rights to suspects, not counsel, and ultimately to reverse the judgment of the Illinois Supreme Court.

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[6] In the Sixth Amendment context, the Illinois Supreme Court has held that a defendant validly may waive his right to counsel even where counsel and police had made an agreement that the defendant would not be questioned in the absence of counsel. *People v. Aldridge*, 79 Ill.2d 87, 402 N.E.2d 176 (1980).

CONCLUSION

For the foregoing reasons, petitioner requests that a Writ of Certiorari be issued to review the decision of the Supreme Court of the State of Illinois and, upon review, to reverse that court's decision in this case.

Respectfully submitted,

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Attorney General, State of Illinois

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Of Counsel

* Counsel of Record

January 21, 1983

APPENDIX A

Docket No. 54575—Agenda 4—January 1982.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DAN W. SMITH, Appellant.

JUSTICE WARD delivered the opinion of the court:

Dan W. Smith, the defendant, was convicted of murder and armed robbery after a jury trial in the circuit court of Ogle County. He was sentenced to life imprisonment for the murder and to 50 years for the armed robbery. Before trial, the defendant had unsuccessfully attempted to have two incriminating statements, which he had given while in police custody, suppressed. The statements were admitted into evidence and read to the jury. The appellate court, holding that the trial court did not err in admitting the statements, affirmed. (91 Ill. App. 3d 438.) We granted the defendant leave to appeal to this court under Rules 315 and 612 (73 Ill. 2d Rules 315, 612).

Pursuant to an arrest warrant issued in Ogle County, the defendant was arrested in Winnebago County shortly before midnight on Friday, September 1, 1978. Mary Smith, who was living with the defendant at the time, was also arrested. The pair was taken to the Winnebago County sheriff's office. There, at about 5:30 a.m. on September 2, they met with attorney Joseph Spiezer, who, Mary Smith testified, agreed to represent them. Later that morning they were advised by a circuit court judge in Winnebago County of the charges against them and that in view of the murder charge bond would not be set. The defendant and Mary Smith were then transported to the Ogle County jail.

The first incriminating statement was taken in the afternoon of Sunday, September 3, during an interrogation of the defendant by an Ogle County sheriff's deputy. Police had attempted to question the defendant in the early morning hours of September 2, but he was incoherent. At the September 3 interrogation, however, he related that Mary Smith and he had driven to The Other Place Tavern in Mary Smith's automobile. Mary waited while he robbed the proprietor, Mrs. Clifty Davis. He took Mrs. Davis with him at gunpoint and drove off with her in her automobile. Mary Smith followed in her car. He said that he shot and killed the proprietor when she attempted to grab his gun. The defendant signed a transcription of the statement on Monday, September 4, while being questioned by the sheriff of Ogle County. He also made a handwritten statement, in which he told a history of heroin use and of being "high on heroin" at the time of the robbery and killing.

An information was filed on September 5. It charged the defendant and Mary Smith with murder and armed robbery.

The defendant raises several issues here, all of which were decided against him in the appellate court. First, he contends that the statements should have been suppressed as being violative of his right to counsel, on the ground that on September 2 the police had prevented his attorney and him from consulting. Too, he claims that the jury was biased in favor of the prosecution because pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770, jurors who stated that they could not impose the death penalty under any circumstances were excused for cause. He argues that his life sentence was an abuse of discretion, and he says that the trial court violated the Constitution of Illinois by disregarding evidence of his rehabilitative potential in sentencing him. Our decision as to the statements given is dispositive of the appeal.

At the hearing on the motion to suppress, attorney Carol Ellerby testified that she was a partner of Spiezer. She said that on September 2, the day before the defendant gave the first incriminating statement, Spiezer called her from Rockford, in Winnebago County, and asked her to visit the defendant and Mary Smith. She arrived at the Ogle County jail at approximately 3 p.m. on September 2. The jailer, whom she thought was John Willard, told her that she could not see the defendant because he was going through heroin withdrawal and was "shaking so hard" that he could not stay on his bed. Ellerby then wrote upon one of her business cards that she was Spiezer's partner and that he should not make a statement without one of his lawyers being present. The jailer agreed to give the defendant the card, and allowed her to see Mary Smith. There was no evidence of any consultation by the defendant with a lawyer until after he had given the incriminating statements.

Willard testified that he was a jailer when Ellerby came to the jail on September 2, but he could not recall her asking to see the defendant. He said that he had never refused an attorney access to a prisoner, and he denied that he told her that the defendant was going through heroin withdrawal. He further testified, as did other officers, that the defendant was not going through withdrawal at the time in question. In fact, no reason was presented at the hearing that would have warranted preventing one from visiting the defendant.

The defendant testified too. He said that he did receive Ellerby's card sometime on September 2. There is no evidence in the record, though, that he was told that Ellerby had requested to see him.

The trial court, in its findings, accepted Ellerby's version of the conversation with Willard and found that at the time of her visit the defendant was represented by

Spiezer's firm. Nevertheless, the court admitted the statements into evidence.

The court said that in the period from sometime in the afternoon of September 2 through September 3 and 4, the defendant was no longer represented by an attorney and found that law-enforcement personnel at the jail were aware of that fact. The findings were based upon testimony that at about 4 p.m. on September 2, Robert Thorsen, another partner of Spiezer, appearing before a different judge, told him that Spiezer had decided not to represent the defendant because he was without funds. At about 4:30 p.m., Thorsen also told Mary Smith that their firm was not going to represent the defendant. There is nothing in the record to show that the defendant was ever advised that Spiezer was not going to represent him. Spiezer did in fact enter an appearance as defendant's counsel on September 5. Spiezer represented the defendant at the hearing of the motion to suppress the confessions and at the defendant's trial.

In addition, the trial court concluded that at the time the defendant gave the statements he knowingly waived his right to have counsel present. The court found that he was given *Miranda* warnings and had freely decided to waive them. At no time, the court found, did he request counsel. Further, the court found that his decision to speak was voluntary, the court noting that the defendant was not without experience with the criminal justice system. The court found, too, that at no time immediately before or during the giving of the statements was the defendant under the influence of any drug or suffering heroin withdrawal such as to affect his free will.

The appellate court agreed with the trial court that the defendant waived his right to counsel at the interrogations. It did hold, though, that the defendant's sixth amendment right to counsel was violated by the jailer's

refusal to allow Ellerby to visit the defendant, but the court considered that this did not taint the statements obtained on September 3 and 4 so as to require their suppression. 91 Ill. App. 3d 438, 442-47.

We consider, however, that the statements should have been suppressed. We rest that conclusion upon the defendant's right to counsel during custodial interrogation. That right stems from the fifth amendment protection against self-incrimination. We need not consider the correctness of the appellate court's analysis in terms of the general sixth amendment right to counsel, which arises upon the commencement of adversary judicial criminal proceedings. 91 Ill. App. 3d 438, 442-45.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Supreme Court held, that prior to custodial interrogation, the subject must be informed that he has the right to remain silent and to have an attorney present. The holding was designed to protect an accused's right against compulsory self-incrimination. In effect, the court recognized a right to counsel under the fifth and fourteenth amendments as to custodial interrogation that is distinct from the right to counsel assured by the sixth amendment. See *Edwards v. Arizona* (1981), 451 U.S. 477, 480-82 n.7, 68 L. Ed. 2d 378, 383-84 n.7, 101 S. Ct. 1880, 1882-83 n.7.

The right to counsel under *Miranda's* holding can, of course, be waived, if the waiver is made knowingly and intelligently. (*Miranda v. Arizona* (1966), 384 U.S. 436, 475, 16 L. Ed. 2d 694, 724, 86 S. Ct. 1602, 1628.) But the giving of prescribed warnings and a clear waiver by the one interrogated are "prerequisites to the admissibility of any statement made by a defendant." (384 U.S. 436, 476, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 1629.) Such a waiver must be demonstrated by the prosecution, though

it may be inferred from the actions and words of the one interrogated. *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 60 L. Ed. 2d 286, 292, 99 S. Ct. 1755, 1757.

Here, we consider that there was not a knowing and intelligent waiver of the right to counsel during the interrogation in view of the interference with Ellerby's effort to consult with the defendant. In this regard, we deem that the decision in *State v. Haynes* (1979), 288 Or. 59, 602 P.2d 272, *cert. denied* (1980), 446 U.S. 945, 64 L. Ed. 2d 802, 100 S. Ct. 2175, is persuasively relevant.

In *Haynes*, the defendant was arrested on a Saturday evening as a suspect in a murder. He was questioned that night and made some admissions. Meanwhile, his wife retained an attorney to represent him. The lawyer telephoned the police at about 8 a.m. on Sunday morning and informed them that he was coming to confer with the defendant at the jail. At 8:30 a.m., about the time the attorney arrived, the police removed the defendant to another location to question him. There, the defendant gave details of the murder. On Sunday evening he reenacted the murder on video tape. He gave another statement on the following day.

The trial court found that the police, who had taken the defendant from the jail, were aware that the attorney was coming to visit the defendant and knew that moving him would frustrate the attorney's intention to confer with the defendant. The trial court did not suppress any statements, however, because it found that the defendant was repeatedly advised of his rights and understood them. He was convicted of murder and sentenced to life imprisonment.

The Supreme Court of Oregon reversed the conviction, on the ground that the trial court should have suppressed the statements obtained after the police had interfered with the attorney's attempt to consult with the

defendant. The court acknowledged that a person in custody, after being advised of his relevant rights, could voluntarily waive consulting with a lawyer and give statements which would be admissible at trial. The court, however, held:

> "[W]hen unknown to the person in this situation an identified attorney is actually available and seeking opportunity to consult with him, and the police do not inform him of that fact, any statement or the fruits of any statement obtained after the police themselves know of the attorney's efforts to reach the arrested person cannot be rendered admissible on the theory that the person knowingly and intelligently waived counsel." 288 Or. 59, 70, 602 P.2d 272, 277.

The court reasoned:

> "It is not disputed that an arrested person has a right to have access to counsel when taken into custody and thereafter, subject only to the practical necessities of custody that may temporarily prevent immediate communication with counsel. We know nothing in Oregon law, nor did counsel for the state when asked, that would authorize the police to prevent or delay communication between an arrested person and a lawyer who is, or who is asked to become, that person's attorney. Certainly nothing of the kind follows from the simple fact of an arrest." 288 Or. 59, 70-71, 602 P.2d 272, 277.
>
> "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. *** We do not hold *** that this decision can be made only in the attorney's presence, although in practice this would obviate the recurring problems of proof that have been mentioned. But we agree *** that when law enforcement officers have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they cannot thereafter rely on defendant's 'waiver' for the use of his subsequent uncounseled statements or resulting evi-

dence against him. We believe this rule protects the suspect's right under [the State constitution] and the federal fifth and 14th amendments not to testify against himself ***." 288 Or. 59, 72-74, 602 P.2d 272, 278-79.

There have been other holdings in which courts have suppressed statements obtained after police have foiled an attorney's efforts to consult with a client. See *State v. Matthews* (La. 1982), 408 So. 2d 1274 (because police refused to tell defendants their attorney was available and seeking to assist, subsequent interrogation was made without informed waiver of rights under State constitution incorporating the *Miranda* rules); *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560 (suspect's waiver of right to counsel at interrogation is ineffective where police have refused to admit counsel and to inform suspect of attorney's presence); see also *Commonwealth v. Hilliard* (1977), 471 Pa. 318, 370 A.2d 322 (plurality opinion) (when the attorney has been denied access to the suspect, and the suspect has not been told of the availability of the attorney, failure by the suspect to request counsel cannot support a finding of waiver of counsel); *State v. Jones* (1978), 19 Wash. App. 850, 578 P.2d 71 (when the attorney requested that interrogation not be conducted in his absence, and police do not inform the defendant of the lawyer's availability and desire to be present, there was no knowing and intelligent waiver of the right to counsel).

The Supreme Court in *Miranda* also condemned a police refusal to admit counsel. In *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, police refused a suspect's request to speak with his attorney during a preindictment interrogation. The police also failed to advise him that he had the right to remain silent. The court in *Escobedo* judged that the police conduct violated the suspect's right to the assistance of counsel under the sixth amendment. In *Miranda*, the court discussed the *Es-*

cobedo decision. It noted that Escobedo's lawyer had visited the jail during the interrogation and asked to speak with the suspect. The *Miranda* court stated: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." (*Miranda v. Arizona* (1966), 384 U.S. 436, 465-66 n.35, 16 L. Ed. 2d 694, 718-19 n.35, 86 S. Ct. 1602, 1623 n.35.) We would observe, though, that in looking back to *Escobedo* the Supreme Court has viewed it as a decision designed to protect the fifth amendment privilege against compelled self-incrimination rather than to insure the sixth amendment right to counsel. *Kirby v. Illinois* (1972), 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417, 92 S. Ct. 1877, 1882.

We hold that when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him.

Here the defendant was not informed that his attorney was available to confer with him during the weekend and that the attorney had personally requested to see him. We would note, too, that the reason given the attorney for denying access to the defendant, which Ellerby testified that she believed, was one which would indicate that no early interrogation of the defendant was to be expected.

The State points out that the defendant at some time did receive Ellerby's business card. But without his being informed that Ellerby had also requested to confer with him, the card and message were of little value. Simply receiving the card easily could have led the defendant to believe his lawyers were too busy that weekend to consult with him in person or were disinterested in his case or wel-

fare. Receiving the card and no more would have chagrined and disappointed the defendant in the character of representation he was receiving from those who he believed were his attorneys. Accepting the State's argument would, as the defendant observes, permit police to isolate a suspect from his counsel and regulate or determine what information or advice a suspect is to receive.

Finally, the State argues that even if the statements should not have been admitted, admitting them was harmless error. Considering the record we cannot agree. The statements were the basis for the State's lengthy, detailed and apparently effective cross-examination of the defendant, who testified that he was nowhere near the tavern at the time of the crimes. Moreover, as the defendant points out, the only other evidence directly linking the defendant to the crimes was the testimony of Mary Smith, who pleaded guilty to armed robbery, and whose murder charges were dropped in exchange for her testimony.

For the reasons given, the judgment of the appellate court is reversed. The judgments of the circuit court convicting the defendant of armed robbery and murder are reversed and the cause is remanded to the circuit court for a new trial.

Reversed and remanded.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

November 24, 1982

State's Attorneys Appellate
Service Commission
Second Judicial District
35 Fountain Square Plaza - Suite 204
Elgin, Illinois 60126

No. 54575—People State of Illinois, appellee, vs. Dan W. Smith, appellant. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

We have received from the Reporter of Decisions a corrected page 7 to the opinion. Kindly substitute the enclosed page to the opinion forwarded to you on September 17, 1982.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

APPENDIX C

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD 62706

December 9, 1982

Hon. Tyrone C. Fahner
Attorney General of the
State of Illinois
188 W. Randolph Street
Chicago, IL 60601

THE COURT HAS ENTERED THE FOLLOWING ORDER IN THE CASE OF: GEN. NO. 54575

In re: People State of Illinois
v. Dan W. Smith.

"The motion by the appellee for recall of mandate is allowed. Appellee is directed to file with the Clerk of this Court written notice of the filing of the petition with the United States Supreme Court."

A certified copy of this order has been forwarded to the Clerk of the Appellate Court, Second District and Clerk of the Circuit Court, Ogle County.

ALL COUNSEL OF RECORD JULEANN HORNYAK, CLERK

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD 62706

January 10, 1983

State Appellate Defender
63 Douglas Avenue
Elgin, IL. 60120

In re: People State of Illinois, appellee. vs.
Dan W. Smith, appellant. No. 54575

C Counsel:

O We have today received from the Reporter of Decisions a corrected page 7 and 8 to the opinion in the above cause.

P May we ask that you substitute the enclosed pages to the opinion forwarded to you on September 17, 1982.

Y

Very truly yours,
/s/ Juleann Hornyak
Clerk of the Supreme Court

JH:jae
cc:Tyrone Fahner
Dennis Schumacher
SAASC-Elgin

APPENDIX D

No. 79-245

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

DAN W. SMITH,

Defendant-Appellant.

Appeal from the Circuit Court for the 15th Judicial Circuit, Ogle County, Illinois.

MR. JUSTICE VAN DEUSEN delivered the opinion of the court:

On September 5, 1978, an information was filed against the defendant, Dan Smith, and Mary Smith, charging them with the murder (Ill.Rev.Stat. 1977, ch. 38, par. 9-1(a)) and armed robbery (Ill.Rev.Stat. 1977, ch. 38, par. 18-2(a)) of Clifty Davis. These offenses were committed on August 25, 1978. Mary Smith's case was severed from that of the defendant prior to trial. After a trial by jury, the defendant was found guilty of both offenses. The State sought to impose the death penalty, and the defendant waived a jury for the purpose of sentencing. After holding a separate sentencing hearing to determine whether the death penalty should be imposed, the trial court concluded that sufficient mitigating circumstances were present which precluded the imposition of the death penalty. The court subsequently sen-

tenced the defendant to a term of natural life imprisonment on the murder conviction and to a concurrent term of 50 years imprisonment on the armed robbery conviction. The defendant appeals.

On appeal, the defendant first contends that the trial court erred in not suppressing two incriminating statements which he alleges were elicited in violation of his right to counsel as provided in the sixth and fourteenth amendments to the United States Constitution (U.S.Const., amends VI, XIV) and section 8, article 1, of the Illinois Constitution of 1970 (Ill.Const. 1970, art. 1, §8). More specifically, he asserts that his tape-recorded statement of September 3, 1978, was the product of an unlawful intrusion into the attorney-client relationship which occurred when his attorney was refused permission to meet with him at 3 p.m. on Saturday, September 2, 1978. He contends that this interference amounted to a violation of his sixth amendment right to counsel and tainted the subsequent confession of September 3. In this regard, he maintains that there were not intervening circumstances present which were sufficient to dissipate the taint of illegality caused by the police misconduct. Continuing, he asserts that since his September 4 statement was the fruit of the first illegally elicited statement, it too must be suppressed. Finally, the defendant argues that at no time did he waive his sixth amendment right to the assistance of counsel. Inherent in this contention is the assertion that the statements must be suppressed as independently violative of his sixth amendment right to counsel during police interrogation, since adversary judicial proceedings had already commenced.

The sixth amendment right to counsel attaches at the time that adversary judicial criminal proceedings have been initiated against the accused, whether by way of formal charge, arraignment, preliminary hearing, information or indictment. (*Brewer v. Williams* (1977), 430 U.S. 387, 398, 51 L.Ed.2d 424, 436, 97 S.Ct. 1232, 1239, citing *Kirby v. Illinois* (1972), 406 U.S. 682, 688-89, 32 L.Ed.2d 411, 417, 92 S.Ct. 1877, 1881-82; accord, *People v. Burbank* (1972), 53 Ill.2d 261, 271-72, *cert. denied* (1973), 412 U.S. 951, 37 L.Ed.2d 1004, 93 S.Ct. 3017.) This court in

People v. Hinton (1974), 23 Ill.App.3d 369, 372 held that a complaint followed by an arrest warrant and the actual arrest of the defendant amounts to a formal charge under the language of *Kirby v. Illinois* describing the kind of adversary judicial criminal proceedings which vests the right to counsel. (Accord, *People v. Marshall* (1977), 47 Ill.App.3d 784, 786, see *United States ex rel. Sanders v. Rowe* (N.D. Ill. 1978), 460 F.Supp. 1128, 1139; *People v. Huffman* (1980), 81 Ill.App.3d 901, 909; *People v. McDonald* (1974), 23 Ill.App.3d 86, 90, *aff'd* (1976), 62 Ill.2d 448.) Here the defendant had been arrested and appeared before a judge at 9:30 a.m. on September 2, 1978, at which time the judge read him the complaint and the charges against him and informed him of his constitutional rights. Based on the cases cited immediately above and the fact that the defendant had appeared before a judicial officer, the defendant's sixth amendment right to counsel attached at the time he appeared before the judge.

Having disposed of this threshold inquiry, the question arises whether the defendant's sixth amendment right to counsel was infringed on September 2, 1978, when attorney Ellerby of the Spiezer law firm attempted to visit or consult with him.

Attorney Carol Ellerby, a partner in the Joseph Spiezer law firm, testified that she went to the Ogle County jail at approximately 3 p.m. on Saturday, September 2, 1978, to visit the defendant and Mary Smith. She spoke with the jailer, whom she believed was John Willard, and informed him that she had come to see Dan Smith and Mary Smith. He told her that she could not see the defendant because he was undergoing withdrawal and was shaking so hard he could not stay on the bed. She took out a business card and wrote on the back of it that she was Joe Spiezer's partner and the defendant was not to make a statement unless one of his lawyers was present. She gave the card to the jailer and asked him if he would see that the defendant received it; the jailer responded that he would do so. Attorney Ellerby did not see the defendant at any time on September 2.

Carol Ellerby then met with Mary Smith shortly after she was refused permission to visit the defendant. Ellerby testified that as of 3 p.m. the Spiezer law firm was representing Mary Smith. After visiting briefly with Mary Smith, Ellerby informed attorney Spiezer that she was not allowed to consult with the defendant. At approximately 3:30 p.m., she returned to the jail with another partner of the Spiezer firm, Robert Thorsen, and attempted to see Mary Smith again. Ellerby and Thorsen met with Mary Smith at 4:30 p.m. and informed her that they did not represent the defendant and asked her if she wanted the Spiezer firm to represent her. Mary Smith responded that she was going to be represented by another attorney provided by her family.

Judge Moore testified that he met with attorneys Ellerby and Thorsen at their request on Saturday, September 2, 1978, at approximately 4 p.m. The judge stated that Thorsen informed him that the Spiezer law firm did not represent the defendant because he did not have any money.

Preliminarily, it should be noted that the trial court made a finding that the Spiezer law firm was representing the defendant as of 3 p.m. on September 2, although the trial court believed that such representation had been terminated an hour or so later after attorneys Ellerby and Thorsen met with Judge Moore. In addition, all the law enforcement officials who testified in this cause stated that the defendant was not undergoing heroin withdrawal on Saturday, September 2, and no valid reason was adduced at trial to explain or justify the denial of personal consultation between attorney Ellerby and the defendant.

Given these facts, the jailer wrongfully interfered with the attorney-client relationship here. The question remains whether it was a wrongful interference which rose to the level of a constitutional infringement of the defendant's sixth amendment right to counsel such that the statements subsequently obtained from the defendant must be suppressed.

Relying on fourth amendment cases which have applied the taint analysis and suppressed evidence which was obtained after a violation of the defendant's constitutional rights (*Dunaway v. New York* (1979), 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248; *Brown v. Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 407), the defendant contends that the statements he gave to Officer Messer approximately 24 hours after attorney Ellerby's attempted visit was the product of the unlawful interference with the attorney-client relationship and therefore must be suppressed, since no intervening circumstances occurred to dissipate the taint of the illegal police conduct. We believe that the fourth amendment precedent for requiring the exclusion of evidence tainted as a result of police conduct which abridges constitutional rights is equally applicable in the sixth amendment right to counsel area. See *United States v. Wade* (1967), 388 U.S. 218, 239-42, 19 L.Ed.2d 1149, 1164-67, 87 S.Ct. 1926, 1939-40; *Maglio v. Jago* (6th Cir. 1978), 580 F.2d 202, 207; *United States v. Massey* (M.D. Fla. 1977), 437 F.Supp. 843, 861-62.

To determine whether there is a sufficient causal connection between the illegality and the subsequent confession given by the defendant on September 3 so as to require its exclusion from evidence, it is necessary to apply the test recently articulated in *Dunaway v. New York* (1979), 442 U.S. 200, 60 L.Ed.2d 284, 99 S.Ct. 2248 and *Brown v. Illinois* (1975), 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254. Thus, the court must consider the temporal proximity of the constitutional violation and the resultant confession, the presence of intervening circumstances, the purpose and flagrancy of the official misconduct and whether *Miranda* warnings were given. *Dunaway v. New York*, 422 U.S. 200, 218, 60 L.Ed.2d 824, 839-40, 99 S.Ct. 2248, 2259; *Brown v. Illinois*, 422 U.S. 590, 603, 45 L.Ed.2d 416, 427, 95 S.Ct. 2254, 2261; accord, *People v. McMahon* (1980), 83 Ill.App.3d 137, 144.

We note that almost 24 hours passed between the time attorney Ellerby was denied permission to see the defendant on September 2 and the initiation of the questioning

session with Officer Messer which resulted in the defendant's statement of September 3. There is no evidence in the record that the police attempted to question the defendant during this 24 hour hiatus. (*Cf. People v. James* (1980), 82 Ill.App.3d 551, 558.) This is not a case where the police prevented the attorney from conferring with her client and then sought to exploit her absence by interrogating the defendant immediately after or shortly after she departed.

In addition, there were significant intervening circumstances which support the view that causal connection between the police misconduct and the incriminating statement of September 3 was sufficiently attenuated to permit the use at trial of the statement.

The defendant was given the requisite *Miranda* warning by Ogle County deputy sheriff Melvin Messer early on the morning of Saturday, September 2, 1978, and acknowledged that he understood the warnings and his constitutional rights; however, the defendant was unable to respond to Messer's questions in a logical or coherent manner at that time. At approximately 9:30 a.m. on that morning, he was taken before a judge who advised him of his right to remain silent, his right to the assistance of counsel during any interrogation or questioning, his right to a prompt preliminary hearing and the fact that there was no bond in this case. The judge's testimony was that the defendant's answers were responsive to his questions and that he appeared normal and was not sick or staggering. On September 3, 1978, at approximately 2:15 p.m., Officer Messer again advised the defendant of his constitutional rights as contained in the *Miranda* warnings, and the defendant told him that he understood his rights and that the officer didn't have to recite them. The defendant consented to give a statement and asked that it be recorded. Prior to the start of the formal statement, which took place from 2:35 p.m. to approximately 3 p.m. on that date, the defendant was allowed to meet with Mary Smith for ten minutes or so. Following this conference with Mary Smith, he was again given the *Miranda* warnings and stated he understood them and was

willing to talk about the case. He then gave the tape-recorded statement in question, in which he confessed that he committed the armed robbery and shot the victim, although he contended that the shooting was accidental.

At 9 a.m. on Monday, September 4, 1978, the defendant was examined by Dr. Srichai, who treated Dan Smith for heroin withdrawal and found him capable of reading, understanding and signing the tape-recorded statement of the previous day, which subsequently had been transcribed. At the request of the defendant, he was again permitted to confer with Mary Smith. In Mary Smith's presence the sheriff again read the defendant the *Miranda* warnings and the defendant acknowledged he understood them. The defendant and Mary Smith went over the statement together, and the defendant made some corrections and asked for another statement form on which he added a brief statement in his own handwriting, in which he again implicated himself in the murder and armed robbery. Jerry Brooks, sheriff of Ogle County, testified that the defendant appeared normal but a little nervous and that no threats or promises had been made to the defendant. The defendant was not physically mistreated; nor did he complain at any time to the sheriff that he was being prevented from seeing a doctor.

The defendant testified that he took drugs on the morning of the murder of Clifty Davis and that he had been taking drugs throughout Friday, September 1, 1978, the day of his arrest. He stated that he had been using heroin on a daily basis for more than a year prior to his arrest but did not experience problems understanding what people were saying during the period of his drug abuse; he also believed he understood what the police officers were saying to him during the questioning which occurred on the morning of September 2, 1978. On Saturday morning September 3, 1978, he asked an officer if he could immediately see a doctor. He also admitted that Officer Messer gave him the *Miranda* warnings on Sunday afternoon and that he understood them. He further testified that after he talked to Officer Messer for a few minutes on Sunday afternoon he asked Messer if he could see a doctor and that Messer informed him that he could

see the doctor after he gave a statement, because the statement would not be any good if he gave it while under medication. Approximately 30 minutes after he had given the tape-recorded statement, he was visited by Dr. Warmolts, at which time he was given some Valium. He admitted that he did not mention to Dr. Warmolts that he had to confess to the instant offense in order to get an opportunity to see the doctor. In addition, he testified that on Monday morning September 4, 1978, he was examined by Dr. Srichai and given medication as a result. Approximately one hour later, he met with Sheriff Brooks. At this time he was allowed to consult with Mary Smith; he then examined the eight-page typewritten statement he had orally given to Officer Messer the day before, made certain corrections and signed each page of the statement. He then requested a blank statement page, made an additional statement and signed it. The defendant further stated that he freely and voluntarily signed the statements and that nobody twisted his arm to get him to sign them.

We emphasize here that the defendant testified that he received the card containing the cautionary message which attorney Ellerby had given the jailer. Apparently the police forwarded from the attorney to the defendant the cautionary message which had warned Dan Smith not to make any statements unless one of his attorneys was present. Although this message may not have been as effective, influential or forceful as a personal admonition, it is a significant event indicating both that the defendant did receive a warning from his attorney and that the police did not completely prevent the attorney from apprising or impressing upon her client that he should not make a statement in the absence of counsel. Furthermore, the police did grant the defendant's request to speak with Mary Smith before he gave the incriminating statement to Officer Messer on September 3. Given the evidence in this case, no inference or suggestion can be drawn from the record that law enforcement officials were engaged in a calculated plan to keep the defendant incommunicado until a confession could be extracted. Compare *Darwin v. Connecticut* (1968), 391 U.S. 346, 20 L.Ed.2d 630, 88 S.Ct. 1488.

An additional factor which further insulated the defendant's September 3 statement from the unlawful police conduct on September 2 is the giving of the *Miranda* warnings before questioning and the defendant's waiver of his rights in response to the admonitions. While the *Miranda* warnings alone and *per se* are not sufficient to attenuate the taint of unconstitutional conduct (*Dunaway v. New York* (1979), 442 U.S. 200, 216-17, 60 L.Ed.2d 824, 838-39, 99 S.Ct. 2248, 2258-59; *Brown v. Illinois* (1975), 422 U.S. 590, 601-603, 45 L.Ed.2d 416, 426-27, 95 S.Ct. 2254, 2260-61), the giving of them is a significant factor favorable to the State's position when considered together with the other factors discussed above. Finally, from what has been said above, we believe that the conduct of the police was not purposely designed to infringe upon the defendant's sixth amendment right to counsel and was not of a flagrant nature.

Given the totality of the facts and circumstances of this case, we believe the causal connection between the police misconduct and the defendant's statement of September 3 was sufficiently attenuated to dissipate the taint of illegality. Accordingly, we determine that the statement of September 3 was not obtained as a result of the unlawful interference with the attorney-client relationship on September 2; similarly, the subsequent handwritten statement given to Sheriff Brooks on September 4 was not tainted by the prior police illegality. Thus, we conclude that the incriminating statements were properly admitted into evidence.

The defendant also contends that, in view of the totality of the circumstances surrounding the making of the tape-recorded statement on September 3, 1978, he did not knowingly waive his sixth amendment right to counsel. The determination of whether the accused knowingly, intentionally and intelligently waived the right to counsel depends on the particular facts and circumstances of the case, including the conduct, background and experience of the accused, and a court will indulge in every reasonable presumption against the waiver of a constitutional right such as the right to counsel. (*People v. Blanchard* (1967), 37 Ill.2d 69, 74; see *Brewer v. Williams*

(1977), 430 U.S. 387, 404, 51 L.Ed.2d 424, 440, 99 S.Ct. 1232, 1242; *People v. Petty* (1977), 54 Ill.App.3d 1044, 1050.) Where the question of whether the defendant knowingly and voluntarily waived the right to counsel is raised in a motion to suppress, the reviewing court will not disturb the trial court's ruling unless it is contrary to the manifest weight of the evidence. *People v. Aldridge* (1980), 79 Ill.2d 87, 94-85; *People v. Petty* (1977), 54 Ill. App.3d 1044, 1050.

In this case, at the conclusion of the hearing on the motion to suppress, the trial court determined that the defendant had intelligently and knowingly waived his right to counsel under the sixth amendment and consequently the two statements admitted into evidence were not taken in derogation of his sixth amendment right to counsel. The trial court made a number of findings which are relevant to the sixth amendment issue of waiver: (1) that the defendant did not make any request, express or implied, to consult with a lawyer, including members of the Spiezer law firm, or to have a lawyer present before or during the making of the two statements at issue; (2) that he was not represented by an attorney between 4 p.m. Saturday afternoon, September 2, 1978, and Tuesday morning, September 5, 1978, and jail and police personnel were aware of this fact; (3) that he was fully and completely advised of his rights in accordance with the *Miranda* warnings prior to the making of both statements, that he understood the warnings and his rights each time he was advised of them and freely, voluntarily and intelligently waived these rights; (4) that at no time did he refuse to talk to the police; (5) that at no time prior to or during the giving of the oral statement of September 3 did the defendant request to see a doctor; (6) that the defendant was visited by a physician between the giving of the September 3 statement and the handwritten statement of September 4, 1978 (actually he was seen by two doctors during this time period); (7) that at no time immediately prior to or during the giving of the statements was the defendant under the influence of heroin or other drugs, suffering the effects of heroin withdrawal or other drug-induced incapacity or ex-

periencing pain of sufficient magnitude to interfere with the exercise of his will; (8) that the defendant at no time was told or led to believe that he could see a doctor after he gave a statement or that he could not have medication because it might affect the validity of his statement; (9) that no promises were made to the defendant and no threats or force were directed against him; and (10) that the defendant had prior experience with the criminal justice system and was not exceptionally young or unintelligent.

After a careful examination of the evidence in this case, in light of the foregoing principles of law, we determine that there is ample evidence to support the findings of the trial court; that its findings are not against the manifest weight of the evidence; that the defendant did knowingly, intelligently and voluntarily waive his sixth amendment right to counsel and that his constitutional rights were not violated. See *United States v. Springer* (7th Cir. 1972), 460 F.2d 1344, 1351-53, *cert. denied* (1972), 409 U.S. 873, 34 L.Ed.2d 125, 93 S.Ct. 205; *People v. Smith* (1969), 42 Ill. 2d 479, 482-83; *People v. Sandoval* (1976), 41 Ill.App.3d 741, 743-45; *People v. Anthony* (1976), 38 Ill.App.3d 427, 430-32; *People v. Kelley* (1973), 10 Ill.App.3d 193, 196-97.

The defendant's second contention is that the exclusion of prospective jurors pursuant to *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 resulted in the selection of a jury which was biased in favor of the prosecution on the question of guilt or innocence. His assertion is based upon the trial court's excusing for cause four prospective jurors who had expressed the conviction that they would not vote, under any circumstances, at sentencing to impose the death penalty against the defendant.

In support of his position, the defendant has cited three studies which he claims supply convincing evidence that a "death qualified" jury is conviction-prone or biased in favor of the prosecution on the issue of the defendant's guilt or innocence. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination*

Process, 84 Harv.L.Rev. 567 (1971); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U.ofColo.L.Rev. 1 (1970); Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 Wisc.L.Rev. 734.

The court in *People v. Kirkpatrick* (1979), 70 Ill.App.3d 166 was presented with the same study conducted by Professor George Jurow which the defendant cites in his brief. It should be noted that the Jurow work itself contains a brief discussion and critique of the Boehm and Bronson studies which the defendant also relies upon in support of his position here. Although the court determined that the Jurow study was superior to former works, it rejected the defendant's contention that the study provided sufficient data to demonstrate that a jury empaneled in accordance with the requirements of *Witherspoon* is conviction-prone. (70 Ill.App.3d 166, 172; accord, *People v. Rhinehardt* (1973), 107 Cal.Rptr. 34, 507 P.2d 642, 652-53.) A divided court in *Kirkpatrick* found that Professor Jurow's study did indicate that a jury would have a very slight bias in favor of conviction if those persons who unalterably opposed the death penalty were excluded from the jury. But the court also stated that the study itself admitted that such bias is ameliorated by the exclusion of prospective jurors who are disposed to impose the death penalty. Noting that highly death-penalty-prone jurors were excused during the *voir dire* in that case, the *Kirkpatrick* court concluded that the defendant had failed to demonstrate that the jury selection process there resulted in a conviction-prone jury. 70 Ill.App.3d 166, 172.

Most recently in *People v. Carlson* (1980), 79 Ill.2d 564, 586, the same three studies relied upon by the defendant here were called to the attention of our supreme court. Because of the nature of the issues before the court in the *Carlson* case, the court did not decide the validity of the studies in question but in *dictum* stated that these articles did support the defendant's assertion that a jury from

which persons who opposed the death penalty were excluded would be more prone to find a defendant guilty.

It is not necessary that we determine the validity of these studies, since an examination of the jury selection in this case discloses that, as in *Kirkpatrick*, the highly death-penalty-prone jurors were actually excused during the *voir dire*. This procedure, in effect, eliminated those who, under the Jurow study, would have caused the selected jury to be biased in favor of conviction. Furthermore, the record in this case is replete with instances where veniremen were excused because they were admittedly unable to be impartial regarding the determination of the defendant's guilt or innocence. The record also indicates that all persons who were empaneled satisfactorily answered questions posed by the court to ascertain whether they could be impartial on the question of the defendant's guilt or innocence. In addition, it should be kept in mind that in a capital case the defendant, as well as the State, is granted 20 peremptory challenges which he may exercise if he is not satisfied with the impartiality of any prospective juror. (Ill.Rev.Stat. 1977, ch. 38, par. 115-4(3).) The defendant in this case has neither claimed nor demonstrated that he exhausted his peremptory challenges. A defendant's failure to exhaust his peremptory challenges indicates that defense counsel was of the opinion that the selected jury represented a fair and impartial trier of the facts. *Cf. People v. Sleezer* (1956), 9 Ill.2d 57, 61; *People v. Black* (1970), 130 Ill.App.2d 996, 1000, *aff'd* (1972), 52 Ill.2d 544, 557, *cert. denied* (1973), 411 U.S. 967, 36 L.Ed.2d 689, 93 S.Ct. 2155.

Given the facts and circumstances of this case, we conclude that, even if we were to assume the validity of the aforementioned studies, the jury selection procedure here did not produce a jury biased in favor of the prosecution so as to deny the defendant a fair trial by an impartial jury.

Next the defendant asserts that section 5-8-1(a)(1) of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, par. 1005-8-1(a)(1)), the sentencing provision providing for a term of natural life imprisonment, does

not expressly require the trial court to consider the goal of restoring the offender to useful citizenship in accordance with the mandate of article I, section 11, of the Illinois Constitution of 1970 (Ill.Const. 1970, art. I, §11) and consequently the sentencing section is unconstitutional on its face. This contention lacks merit.

Article I, section 11, of the Illinois Constitution of 1970 provides:

> "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." (Ill. Const. 1970, art. I, §11.)

It has been judicially recognized that the language of this provision imposes a constitutional requirement that the accused's rehabilitative potential be considered in fixing sentences. (*People v. LaPointe* (1980), 85 Ill.App.3d 215, 222-23, *appeal allowed* (1980), ... Ill.2d .....; *People v. Kane* (1975), 31 Ill.App.3d 500, 512.) Our supreme court has consistently recognized and applied the aforementioned constitutional mandate and has determined that, for the purpose of sentencing, the spirit and objective of the law are upheld when the sentence reflects both the seriousness of the offense and the defendant's potential for rehabilitation. *People v. Carlson* (1980), 79 Ill.2d 564, 587; *People v. Murphy* (1978), 72 Ill.2d 421, 439.

The Illinois Supreme Court has also stated that the general purpose of the Unified Code of Corrections is to rehabilitate the offender, if possible, and to restore him to useful citizenship. (*People v. Mahle* (1974), 57 Ill.2d 279, 285.) This purpose or objective of rehabilitation is expressly set forth in section 1-1-2(d) of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, par. 1001-1-2(d).) More recently, the court in *People v. Perry* (1980), 81 Ill.App.3d 422, 431 rejected a challenge to the constitutionality of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, par. 1001-1-1 *et seq.*) which was based on the ground that the legislature, in enacting the new Code, effectively abandoned the concept of rehabilitation as an objective of sentencing in violation of article I, section 11, of the Illinois Constitution of 1970.

Thus, it is manifest that both article I, section 11, of the Illinois Constitution and section 1-1-2 of the Unified Code of Corrections mandate that the trial court consider the rehabilitative potential of the defendant in determining whether to impose a term of natural life imprisonment under section 5-8-1(a)(1) of the Code. Contrary to the defendant's assertion, section 5-8-1(a)(1) does not permit the court to impose a sentence of natural life imprisonment solely on the basis of the nature or seriousness of the offense committed. Furthermore, no other sentencing provision of the Unified Code of Corrections expressly requires the consideration of a defendant's rehabilitative potential, and the defendant's argument would naturally lead to the untenable conclusion that all prison sentences imposed in Illinois are therefore violative of the constitutional mandate of article I, section 11.

The defendant also maintains that the trial court contravened the express mandate of article I, section 11, of the Illinois Constitution of 1970 when it sentenced him to life imprisonment under section 5-8-1(a)(1) of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, par. 1005-8-1(a)(1)) without expressly finding that the defendant was devoid of rehabilitative potential.

The basic premise of the defendant's constitutional challenge is that the trial court is required to find that the defendant totally lacks the potential to be restored to useful citizenship before a term of natural life imprisonment may be imposed upon him. The defendant relies upon the following language in this court's opinion in *People v. LaPointe* (1980), 85 Ill.App.3d 215, *appeal allowed* (1980), ... Ill.2d .....:

> "* * * [*T*]*here is no indication that* [*the trial judge*] *made any analysis as to the possibility that defendant could at some future date be restored to useful citizenship. Certainly the sentence imposed infers that he deemed that there was no such possibility in this case; however, since a natural life sentence utterly rejects the possibility of rehabilitation, such a conclusion should have been supported by facts and findings.* The trial judge did find that neither defendant's at-

> titude nor the likelihood of the offense recurring mitigated the term of years he was to impose; however, at no time did the judge weigh these factors in terms of restoring defendant to useful citizenship at some time in the future." (Emphasis added.) (85 Ill.App.3d 215, 223.)

While it may be possible to read the language of *LaPointe* to support the defendant's contention here, our decision in that case should not be construed in so broad a manner. Rather, *LaPointe* was intended to make clear that the trial judge must weigh and give consideration to the rehabilitative potential of the defendant as well as the nature and seriousness of the offense committed in determining the imposition of any sentence, including that of natural life, and the record must disclose that the judge did give such consideration to both elements. In *LaPointe*, we determined the record was devoid of any indication that the trial court had considered the defendant's potential for rehabilitation; there we were merely stating that no inference of such consideration could be drawn from the sentence imposed because of the nature of that particular sentence, namely, natural life.

The next issue which the defendant raises is that the trial court erred in imposing a natural life sentence upon him without first stating on the record its findings regarding the possibility of restoring him to useful citizenship at some future date. Under sections 5-4-2(c) and 5-8-1(b) of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, pars. 1005-4-1(c), 1005-8-1(b)), the trial judge is required to specify on the record the particular evidence, information, mitigating and aggravating factors or other reasons which led to the sentencing determination. The purpose of requiring the statement of reasons is to eliminate speculation regarding the trial court's rationale and to provide the appellate court an adequate basis for review of the sentence (*People v. Taylor* (1980), 82 Ill.App.3d 1075, 1077), thereby allowing the reviewing court to determine whether the basis for the sentencing decision is in conformance with the statutory purposes embodied in the Code of Corrections (*People v. Bishop* (1980), 81 Ill.App.2d 521, 523).

At the sentencing hearing in the present case, the trial judge stated in detail his reasons for sentencing the defendant to a term of natural life imprisonment. His statement of reasons for sentencing did not expressly include an analysis or finding regarding the possibility of restoring the defendant to society as a useful citizen. Likewise, although the trial court did discuss factors in aggravation and mitigation, there is no express indication in the sentencing hearing record that the court weighed these factors in terms of determining the rehabilitative potential of the defendant.

However, we note that evidence was presented to the court in support of the defendant's rehabilitative potential. Immediately prior to the sentencing hearing, the court conducted a hearing to determine whether the death penalty would be imposed. During the death penalty hearing, defense counsel argued that the defendant had the potential for rehabilitation and could do productive work to benefit society while incarcerated, if his life were spared. The parties stipulated that the trial court could consider all the evidence presented at trial and all matters presented to the court during the death penalty hearing in reaching a sentencing decision. It is also apparent from the record that the court was fully informed on the defendant's recent religious experiences while incarcerated during trial and before sentencing, since three witnesses testified to the new emphasis of religion in the defendant's life and the sincerity with which he held his beliefs. Also, the trial court considered the presentence report and had evidence before it regarding the defendant's character, history and family relationships, which were relevant factors to be taken into account by the court in evaluating the defendant's potential for rehabilitation. The court considered the above evidence during the hearing on the death penalty when it determined not to impose capital punishment. We are convinced that the court likewise considered and evaluated the same evidence and arguments in support of the defendant's potential for rehabilitation during the subsequent sentencing hearing itself.

Furthermore, as our supreme court recently stated in *People v. Meeks* (1980), 81 Ill.2d 524, 534, "[t]he requirement that the trial judge set forth his reasons in the record for the particular sentence imposed does not obligate the judge to recite, and assign a value to, each fact presented in evidence at the sentencing hearing." An analysis of the record in this case discloses the basis and reasons which led to the sentencing determination. We conclude the trial court sufficiently complied with the requirements of the Unified Code of Corrections.

The defendant further argues that the sentence imposed by the trial court was excessive and therefore constituted an abuse of discretion.

During the sentencing hearing, the trial court made the following statement which is supported by the evidence in this case:

> "* * * [T]his particular murder reflects a cold, calculated plan in which the defendant entered a tavern, confronted the owner, whom he knew and who knew him, threatened her with a gun, demanded and took money, took her hostage from the tavern in her own car, drove with her on the floor of the car with a gun at her head past a prearranged point from whence he was followed by his accomplice, Mary Smith, to an isolated rural location where he shot Clifty Davis at least four times and possibly five times in the head. By his own statement, he indicates that his first shot did not kill her and he then proceeded to fire the remaining shots."

We point out also that the defendant used a single-action revolver which necessitated that he pull the hammer back manually and squeeze the trigger before firing each additional round. Mary Smith's testimony at trial indicated that the defendant was aware that the victim had recognized him and that he shot her because she had recognized him. While the evidence in this case may indicate that the defendant had some potential for rehabilitation, given the nature and seriousness of the offense as well as the manner in which it was committed, we conclude that the trial court struck a proper or equal

balance between the factors of deterrence or punishment, on the one hand, and rehabilitation on the other. (See *People v. Waud* (1977), 69 Ill.2d 588, 596.) The sentence reflects the gravity of the crime and gives sufficient consideration to the defendant's potential for rehabilitation. Accordingly, the defendant has failed to demonstrate that the trial court abused its discretion in imposing sentence. *People v. Cox* (Docket No. 52793, Sept. Term 1980), ... Ill.2d .....; *People v. Perruquet* (1977), 68 Ill.2d 149, 153.

We also reject the defendant's contention that, since the trial court earlier found factors in mitigation sufficient to preclude the imposition of the death penalty, these same factors consequently required the court below to conclude that a term of life imprisonment was likewise improper. Given the singular nature of the death penalty, we believe the trial court may properly view certain factors as sufficiently mitigating so as to preclude the imposition of the death penalty and at the same time find the same factors insufficient to prevent the imposition of a term of life imprisonment. In addition, we believe our recent decision in *People v. LaPointe* (1980), 85 Ill.App.3d 215, *appeal allowed* (1980), ... Ill.2d ....., upon which the defendant relies here, is distinguishable from the case at bar. Unlike the 18-year-old defendant in *LaPointe* who did not have a significant history of prior criminal activity and who had never before engaged in violent conduct, the defendant in this case has a significant history of prior criminal conduct, both as a juvenile and adult, has previously committed crimes involving the use of violence and has frequently displayed aggressive behavior. Nor do we believe that the evidence of the defendant's history of drug use and the conflicting evidence regarding his use of drugs on the day of the murder warrants the conclusion that the trial court abused its discretion in imposing the natural life sentence. See *People v. Nobles* (1980), 83 Ill.App.2d 711, 717.

The defendant likewise maintains that section 5-8-1 of the Unified Code of Corrections (Ill.Rev.Stat. 1978 Supp., ch. 38, par. 1005-8-1) denies him due process and equal protection of the law in violation of both the Federal and

State constitutions. (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §2.) At the outset it should be noted that the defendant, as far as we can determine, has not advanced any due process argument in his brief. Since the defendant has failed to comply with the standards fixed by Supreme Court Rule 341(e)(7) (Ill.Rev.Stat. 1979, ch. 110A, par. 341(e)(7)), he has waived this issue. *Hillblom v. Ivancsits* (1979), 76 Ill.App.3d 306, 312-13; *People v. Jimerson* (1979), 69 Ill.App.3d 403, 412-13.

With respect to the defendant's equal protection claim, he argues that he is being denied equal protection of the law because he is among a class of offenders who are sentenced to imprisonment without the possibility of returning to society while all other noncapital offenders are returned to society. The defendant's contention is unfounded.

In determining whether a legislative classification contravenes the equal protection clause, the classification is presumed valid, and the party challenging it bears the burden of demonstrating its invalidity. (*People v. McCabe* (1971), 49 Ill.2d 338, 340.) The equal protection clause does not deny the State the power to treat different classes of persons in different ways. (*People v. Bailey* (1980), 79 Ill.2d 410, 416.) The State may use its power to classify in the exercise of the police power without violating the equal protection clause so long as there is a reasonable and rational basis to justify the classification. (*People v. McCabe* (1971), 49 Ill.2d 388, 340-41; see *People v. Collins* (1978), 57 Ill.App.3d 934, 398.) And the equal protection clause recognizes that the legislature has a broad latitude and discretion in classifying. (*People v. McCabe* (1971), 49 Ill.2d 338, 341). It is also well established that, once the legislature decides that an evil exists and determines what measures are necessary to discourage or prevent it, the legislative enactment will not be disturbed unless it manifestly contravenes a constitutional limitation. *People v. Houston* (1976), 43 Ill. App.3d 677, 681.

In light of the above criteria, we determine that a rational basis exists to justify the imposition of the term

of natural life imprisonment upon certain offenders whose crimes are particularly heinous or brutal. We believe the State has a legitimate right and need to protect society, in a permanent way, against a class of murderers who have demonstrated that they are capable of committing acts indicative of wanton cruelty; and the sentence of life imprisonment without the prospect of future release is reasonably designed to remedy the evil. Since individuals who perpetrate heinous murders form a distinct class of offender, the State, in the reasonable exercise of its police power, may classify and treat them as a separate and distinct group. The defendant has failed to establish the invalidity of section 5-8-1 of the Unified Code of Corrections.

The defendant's final contention is that his sentence of natural life imprisonment without the possibility of future release is cruel and unusual punishment in violation of the eighth amendment to the United States Constitution. (U.S. Const., amend. VIII.) We find this assertion unpersuasive. Both the United States Supreme Court (*e.g., Gregg v. Georgia* (1976), 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909) and the Illinois Supreme Court (*People ex rel. Carey v. Cousins* (1979), 77 Ill.2d 531, 540-43) have rejected cruel and unusual punishment challenges to the death penalty. The defendant makes no attempt in his brief to inform the court why the sentence of natural life imprisonment should be viewed as cruel and unusual punishment when the death penalty, which differs from all other types of sanctions in its finality, has been upheld against eighth amendment challenges.

We also note that in *Shick v. Reed* (1974), 419 U.S. 256, 42 L.Ed.2d 430, 95 S.Ct. 379 the Supreme Court sustained the commutation of a death sentence to life imprisonment without parole, stating that:

> "The no-parole condition attached to the commutation of [petitioner's] death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or *statutes otherwise precluding parole: it does not offend the Constitution.*" (Emphasis added.) (419 U.S. 256, 267, 42 L.Ed.2d 430, 439, 95 S.Ct. 379, 385.)

Furthermore, numerous cases have upheld a sentence of life imprisonment without parole against the challenge that such a sanction constitutes cruel and unusual punishment in contravention of the eighth amendment. (*Moore v. Cowan* (6th Cir. 1977), 560 F.2d 1298, 1302-03, *cert. denied* (1978), 435 U.S. 929, 55 L.Ed.2d 525, 98 S.Ct. 1500; *McGinnis v. State* (Ala.Crim.App. 1980), 382 So.2d 605, 608; *State v. Farrow* (1978), 118 N.H. 296, 386 A.2d 808, 812-13; *State v. Dunlap* (1979), 298 N.C. 725, 259 S.E.2d 893, 898-99; *State v. Forrester* (1978), 21 Wash.App. 855, 587 P.2d 179, 188-89.) The defendant has not directed us to, nor have we found, any case which holds that the imposition of a term of life imprisonment for the offense of murder constitutes cruel and unusual punishment. We conclude that the defendant's term of natural life imprisonment without the possibility of future release does not constitute cruel and unusual punishment.

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

NASH and WOODWARD, JJ., concur.

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FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the police, after having illegally denied counsel access to the accused, who is being held in police custody, may thereafter obtain a valid waiver of counsel from the accused without advising him of his attorney's aborted attempt to meet with him.

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NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Respondent, Dan W. Smith, respectfully prays that certiorari to review the judgment and opinion of the Supreme Court of Illinois in People v. Smith, ___ Ill.2d ___, 442 N.E.2d 1325 (1982) be denied.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is complete and adequate in most respects. Additional facts not stated by petitioner are set forth in respondent's Reasons for Denying the Writ.

REASONS FOR DENYING THE WRIT

THE HOLDING OF THE ILLINOIS SUPREME COURT, THAT NO VALID WAIVER OF COUNSEL CAN BE PROCURED FROM AN ACCUSED WHOSE ATTORNEY HAS BEEN DENIED ACCESSS BY THE POLICE UNLESS THE POLICE, IN ADDITION TO MIRANDA WARNINGS, ADVISE THE ACCUSED OF THEIR INTERFERENCE WITH COUNSEL, IS CORRECT AND SHOULD STAND.

In the present case, the Illinois Supreme Court adopted a rule designed to effectuate the respondent's Fifth Amendment privilege against self-incrimination. Although the rule adopted by the Court is consistent with the decisions of every other State court addressing the identical factual situation and with the precedents of this Court, the State contends that such a rule is not constitutionally mandated. For the reasons set forth below, the State's contention should be summarily rejected and

its petition for a writ of certiorari denied.

In the course of reaching its decision, the Illinois Supreme Court adopted several findings of fact, some of which are disputed by the State. This Court is not, however, an appropriate forum in which to relitigate factual questions which have been decided adversely to the petitioner. Thus, the facts of this case, as found by the Illinois Supreme Court, disclose the following:

At 3:00 p.m. on September 2, 1978, Carol Ellerby, a partner of the law firm representing the respondent, Dan Smith, arrived at the Ogle County Jail to speak to Dan and his codefendant, Mary Smith. Ellerby was denied permission to see the respondent by the jailer, who informed her that the respondent was undergoing heroin withdrawal and was shaking so hard he could not stay on the bed. Ellerby left without having an opportunity to consult with the respondent.

In the afternoon of September 3, 1978, the police commenced an interrogation of the respondent, obtaining a tape recorded statement from him at that time and an additional statement the following day. At no time prior to obtaining these statements did the police tell the respondent that his attorney had been present at the jail seeking to consult with him and had been turned away.[1] In addition, although the supposed justification for turning Ellerby away was the respondent's heroin withdrawal, the police denied that the respondent had in fact been undergoing withdrawal symptoms, either at the time of Ellerby's visit or at the time of their interrogation of him; the trial court found these disclaimers regarding the defendant's heroin withdrawal to be true. No valid reason was ever given for the jailer's refusal

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1 The respondent finds the State's dispute as to the accuracy of the Supreme Court's finding on this point (State's petition at p. 14, f.n. 4) puzzling. Since the police denied that Ellerby had ever asked to see the respondent on the afternoon of the 2nd or that they had refused to allow her access to him, it is difficult to understand why they would nevertheless advise the respondent that his attorney had been turned away. Surely the State is not suggesting that, had it known the Illinois Supreme Court would adopt the instant rule, the police would have changed their testimony to conform to the rule, admitting that they did in fact deny counsel access to the respondent but that they had so informed the respondent.

to grant attorney Ellerby access to the respondent.

The Illinois Supreme Court was thus confronted with the following issue: Can an accused knowingly and intelligently waive his right to counsel when the police have illegally denied his attorney access to him and then withheld from him the fact of their interference with counsel? The Court determined that, under these circumstances, no effective waiver was possible. Specifically, the Court ruled as follows:

> We hold that when police, prior to or during custodial interrogation, refuse an attorney appointed or retained to assist a suspect access to the suspect, there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him. People v. Smith, ___ Ill.2d ___, 442 N.E.2d 1325, 1329 (1982).

The holding announced by the Illinois Supreme Court is a logical and appropriate extension of the principles enunciated by this Court in Miranda v. Arizona, 384 U.S. 436 (1966).

In Miranda, this Court held that no statement taken from the accused during custodial interrogation is admissible at trial unless the State establishes that certain procedural safeguards, designed to secure the accused's privilege against self-incrimination, are followed. These safeguards require the giving of the following warnings: 1) that the accused has the right to remain silent; 2) that anything he says can be used against him in a court of law; 3) that he has the right to the presence of an attorney prior to and during interrogation; and 4) that if he cannot afford an attorney, one will be appointed for him. 384 U.S. at 444, 479.

The Miranda Court noted that the right to have counsel present prior to or during custodial interrogation is indispensable to ensuring the full protection of an accused's privilege against self-incrimination. In this regard, the Court commented:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." [cite omitted] 384 U.S. at 466.

It is the very nature and setting of the custodial interrogation process -- its focus on privacy, secrecy, and isolation of the suspect as the most effective tools of interrogation -- which provided the doctrinal underpinnings for this Court's adoption of the procedural safeguards of Miranda. See 384 U.S. at 448-459. Yet the police were able to accomplish the very same objectives in this case, despite the giving of Miranda warnings, through the simple expedient of turning away the attorney who appeared at the jail to consult with and assist the respondent.

The State's contention that the rule adopted by the Illinois Supreme Court effectively allows a third party to invoke a suspect's Fifth Amendment privilege for him (State's petition at pp. 20-21) is thus entirely misfocused. By virtue of the very fact that the accused is in custody, his ability to consult with counsel, and likewise counsel's ability to consult with him, is limited to that access which is granted by the police. Allowing such consultations to take place only at the largesse of the police, and additionally allowing the police the discretion to determine whether they will even advise an accused of counsel's attempt to meet with him, defeats all the underlying principles of the Miranda decision and does, indeed, allow a confession to be obtained "at the unsupervised pleasure of the police."

Both logic and legal precedent bear out the validity of the Illinois Supreme Court's reasoning. The burden of establishing a knowing and intelligent waiver by the accused of his Fifth Amendment rights lies on the State. Miranda v. Arizona, 384 U.S. at 475. To meet this burden, it is not sufficient to establish that the defendant's statement to the police was voluntary. Rather, the State must demonstrate a knowing and intelligent relinquishment or abandonment by the accused of a known right or privilege. Edwards v. Arizona, 451 U.S. 477 (1981). Absent notice to an accused that his attorney has been unlawfully kept from him by the police, it is inconceivable that his waiver of his right to consult with counsel prior to interrogation can be deemed knowing and intelligent.

Under virtually identical factual circumstances, other

jurisdictions have interpreted the Fifth Amendment and this Court's Miranda decision in a manner wholly consistent with the Illinois Supreme Court. See Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969), Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977), State v. Haynes, 288 Or.59, 602 P.2d 272 (1979), cert. den. 446 U.S. 945 (1980), and Weber v. State, ___ Del.___, ___ A.2d ___, 32 CrL 2443 (1983). In each case, the courts have ruled that no knowing and intelligent waiver of the accused's right to counsel is possible, despite the giving of Miranda warnings, where the police have purposefully denied counsel access to the accused or otherwise deceived counsel as to his client's whereabouts, and have then failed to advise the accused of their interference with counsel.

The obvious rationale for the adoption of such a rule is not, as the State posits (State's petition at p. 17), to "inspire the suspect's confidence in his dealings with the police..." (One wonders, indeed, how the accused's knowledge that he has been isolated from his attorney would inspire any confidence in the police.) Rather, its purpose is two-fold: 1) to grant to the accused a renewed opportunity to obtain the consultation which was earlier frustrated by the police; and 2) to deny to the police the fruits of their misconduct absent evidence that they have attempted to rectify the situation.

Some jurisdictions have gone beyond the limited protective rule adopted by the foregoing jurisdictions, holding that the police, before obtaining a valid waiver of rights from an accused, must advise him if his attorney telephoned and requested that the accused not be interrogated in the attorney's absence. State v. Jackson, 303 So.2d 734 (La., 1974), State v. Jones, 19 Wash.App. 850, 578 P.2d 71 (1978).[2] It is only this latter situation, a situation not presented here, in which a contrary view has been expressed.

Thus, in State v. Burbine, 451 A.2d 22 (R.I., 1982), relied upon by the State in its petition, an attorney named Allegra

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2 Although the respondent would submit that this rule is also logically consistent with the underpinnings of the Miranda decision, the validity of such a rule is not placed in issue by the facts of the present case.

Munson phoned the jail where the defendant was being held and advised the police that she would act as the defendant's attorney in the event that the police planned to interrogate him or place him in a line-up; at no point did the attorney present herself at the jail to consult with the defendant. The Rhode Island court ruled that the defendant had validly waived his Fifth Amendment rights even though he had not been advised of the telephone call.

In addition to the fact that the attorney's involvement with the defendant's case was limited to a telephone call, other distinguishing features of Burbine are apparent: 1) The court found that at the time of attorney Munson's phone call to the police station, no attorney-client relationship existed between Munson and the defendant;[3] 2) The court credited the lower court's finding that there was no collusion or conspiracy on the part of the police department to secrete the defendant from the attorney; and 3) The court was concerned that its adoption of the rule sought by the defendant would encourage a floodgate of letters and phone calls to the police from attorneys representing recidivist clients asking that their clients, if arrested, not be interrogated in their absence, thereby creating an administrative nightmare.

Unlike in Burbine, the police facing a situation such as the one they have created in the case at bar face no insurmountable administrative obstacles in applying the Illinois Supreme Court's rule. The rule applies only to a suspect, already held in custody, whose attorney is denied a face-to-face consultation with him. Also unlike Burbine, since the police in the instant case provided no legitimate justification for their refusal to allow the respondent's attorney access to him, their behavior can only be interpreted as a calculated plan to isolate the

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3 Despite the State's contrary contention (State's petition at page 21), that the absence of an attorney-client relationship was a significant factor in the court's decision is apparent from its citation of State v. Fuentes, 433 A.2d 184 (R.I., 1981), a case involving a situation similar to Burbine which was resolved against the defendant due to the absence of an attorney-client relationship. Ohio has also found this factor to be significant in determining the duty of the police to advise an accused of an attorney's attempt to see him. See State v. Chase, 55 Ohio St.2d 237, 378 N.E.2d 1064 (1978).

respondent from counsel until a statement could be obtained.[4]

Miranda prescribes the minimum information which an accused must be accorded in order for the police to secure a knowing and intelligent waiver of his rights. However, it does not purport to, nor can it, cover every conceivable circumstance in which a defendant's Fifth Amendment rights are implicated. See Miranda v. Arizona, 384 U.S. at 444, 467, 478-479, Edwards v. Arizona, 451 U.S. at 487 (Burger, J. concurring). Thus, this Court has recognized that there are circumstances under which a defendant's statement may be deemed inadmissible under the Fifth Amendment notwithstanding the giving of full Miranda warnings. See Edwards v. Arizona, 451 U.S. 477 (1981), Michigan v. Mosley, 423 U.S. 96 (1975) and Sims v. Georgia, 389 U.S. 404 (1967). Illinois courts have likewise adhered to this principle. People v. Koesterer, 44 Ill.App.3d 468, 358 N.E.2d 295 (1976), People v. Ruegger, 32 Ill.App.3d 765, 336 N.E.2d 50 (1975). This case presents just such a situation in which Miranda warnings alone are not sufficient to ensure a knowing and intelligent waiver by the accused of his rights.

Moreover, irrespective of the correctness of the Illinois Supreme Court's ruling with regard to the defendant's Fifth Amendment privilege against self-incrimination, it is apparent that the respondent's Sixth Amendment right to counsel has been violated. As the State conceded in both the Illinois Appellate and Supreme Courts, the respondent's Sixth Amendment right to counsel had attached at the time of the police interference with his attorney. As the State also acknowledges, the State bears a heavier burden of establishing a knowing and intelligent waiver of counsel under the Sixth Amendment than under the Fifth Amendment. United States v. Satterfield, 558 F.2d 655 (2d Cir.,

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4 Surely, allowing the respondent's codefendant, Mary Smith, to be present prior to the interrogation of the respondent could have only enhanced this purpose, even though the State views her presence as evidence of the good faith of the police. It should be noted that by the time the interrogation of the respondent had commenced, not only had Mary given a full statement to the police singling out the respondent as the individual responsible for the planning and execution of the offenses, but she had also retained separate counsel, presumably in anticipation of severing her case from the respondent's. Her interests at that point in time obviously did not coincide with the interests of the respondent.

1976), United States v. Springer, 460 F.2d 1344 (7th Cir., 1972). Absent notice to the respondent of the police interference with his attorney, notice to counsel of the intended interrogation of the respondent, and the opportunity for a consultation between the respondent and counsel which had been earlier frustrated, no knowing and intelligent waiver of the respondent's Sixth Amendment right to counsel can be found. Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), United States v. Henry, 447 U.S. 264 (1980), Estelle v. Smith, 451 U.S. 454 (1981).

The rule the State is seeking in this case, then, is that the police may, with impunity, deny access to counsel retained or appointed to assist a suspect, for whatever reason the police deem appropriate. As long as the defendant himself does not request counsel, his own attorney can be kept from him at the whim of the police, and the police may obtain a knowing and intelligent waiver of the suspect's right to counsel without advising him of their interference with counsel's access to him. Such a rule is not only wholly inconsistent with the very underpinnings of this Court's decision in Miranda v. Arizona, but offends notions of fairness and justice as well. The Illinois Supreme Court ruled correctly in holding the respondent's statements inadmissible under the Fifth Amendment, and no further review of that Court's decision is warranted.

CONCLUSION

For the foregoing reasons, the respondent, Dan W. Smith, respectfully requests that the petitioner's petition for a writ of certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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Josette Skelnik
Assistant Defender
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Date: 4/20

NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Office - Supreme Court, U.S.
FILED
APR 18 1983
ALEXANDER L. STEVAS,
CLERK

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

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YOU ARE HEREBY NOTIFIED THAT ON April , 1983 we mailed the original and nine copies of a Motion for Leave to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari along with Notice and Proof of Service to the Clerk of the above Court, copies of which are hereby served upon you.

G. Joseph Weller

G. Joseph Weller, Deputy Defender

STATE OF ILLINOIS)
) SS
COUNTY OF KANE)

The undersigned being first duly sworn on oath, deposes and says that he mailed the required number of copies of the Petitioner's Reply Memorandum, in the above-entitled cause to the Clerk of the above Court, the Attorney General of Illinois and the State's Attorney of Ogle County, by depositing them in the U.S. Mail in Elgin, Illinois, postage prepaid, this day of April, 1983.

G. Joseph Weller

G. Joseph Weller, Deputy Defender

SUBSCRIBED and SWORN to
before me this 11th day
of April, 1983.

Joan Mayer

Notary Public

NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner

-vs-

DAN W. SMITH, Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, Dan. W. Smith, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Illinois, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Respondent was found to be indigent for purposes of appeal by the State of Illinois, and was represented by appointed counsel in the Illinois Appellate and Supreme Courts.

The petitioner's affidavit in support of this motion is attached hereto.

G. Joseph Weller, Deputy Defender

OFFICE OF THE STATE APPELLATE DEFENDER
63 Douglas Avenue
Elgin, Illinois 60120
(312) 695-8822

Counsel for Petitioner

NO. 82-1259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ILLINOIS, Petitioner,

-vs-

DAN W. SMITH, Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

TO PROCEED IN FORMA PAUPERIS

I, Dan W. Smith, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed on my response to the petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of the proceeding are true.

1. Are you presently employed?

NO

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NO

3. Do you own any cash or checking or savings account?

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

6. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Dan Smith
Dan W. Smith

SUBSCRIBED AND SWORN to before me this 5th day of April, 1983.

Mary E. Gustavson
NOTARY PUBLIC